FILED
AUG 18 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

No. 79-1901

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Petitioner, vs. PETER RODNEY BANNISTER, Defendant-Respondent.	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Defendant-Respondent, PETER RODNEY BANNISTER, by and through his attorney ROBERT M. MOYERS moves this Court for an order permitting him to proceed in this Court, in forma pauperis, in connection with the Petition for Certiorari from the judgment of the Colorado Supreme Court entered in this cause on March 3, 1980, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 53 of the Rules of this Court, and in support thereof attaches the Affidavit of said Appellant.

Filed herewith is Defendant-Appellant's Response to the Petition for Writ of Certiorari.

Respectfully submitted,

Robert M. Moyers

Robert M. Moyers
Attorney for Peter Rodney Bannister
303 South Cascade Ave.
Colorado Springs, Colorado 80903
(303) 636-5241

Supreme Court, U.S.
FILED
AUG 12 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

No. 79-1901

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Petitioner, vs. PETER RODNEY BANNISTER, Defendant-Respondent.	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN THE SUPREME COURT OF THE UNITED STATES IN FORMA PAUPERIS

STATE OF COLORADO)
) ss.
COUNTY OF EL PASO)

PETER RODNEY BANNISTER being duly sworn, deposes and says:

1. I am a citizen of the United States and the Defendant-Respondent in the above-entitled action.

2. I am aware that the PEOPLE OF THE STATE OF COLORADO desire to prosecute an appeal from the judgment entered by the Supreme Court of the State of Colorado, and that a Petition for Certiorari is pending before this Court.

3. Because of my poverty I am unable to pay the costs of responding to said appeal and still be able to provide myself and my dependents with the necessities of life.

4. I contend that the holding of the Supreme Court of the State of Colorado was not in error in this matter, and that it should be affirmed, and that I should be given an opportunity to respond to the Petition for Certiorari herein.

WHEREFORE, Affiant prays that he may have leave to proceed in this Court on appeal in forma pauperis.

Peter R Bannister
Peter Rodney Bannister

STATE OF COLORADO)
COUNTY OF EL PASO) ss.

PETER RODNEY BANNISTER, being first duly sworn, upon oath, deposes and says that he is the Defendant-Respondent in the foregoing Affidavit in Support of Motion to Proceed in the Supreme Court of the United States in Forma Pauperis, that he has read same and that the statements contained therein are true.

Peter R Bannister
Peter Rodney Bannister

Subscribed and sworn to before me this 28 day of July, 1980.

My commission expires: 3-10-84

Notary Public

Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE

UNITED STATES

No. 79-1901

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Petitioner, vs. PETER RODNEY BANNISTER, Defendant-Respondent.	ON PETITION FOR WRIT OF CERTIORARI

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI FROM JUDGMENT OF COLORADO SUPREME COURT

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IN THE SUPREME COURT

OF THE

UNITED STATES

No. 79-1901

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Petitioner, vs. PETER RODNEY BANNISTER, Defendant-Respondent.	)	ON PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENT IN OPPOSITION

COMES NOW the Respondent above named by and through his attorney ROBERT M. MOYERS and in response to the Petition for Writ of Certiorari herein states as follows:

OPINION BELOW

The Opinion delivered in the Court below is reported as 607 P. 2d 987 (1980), and is appended to the Petition for a Writ of Certiorari. The Opinion was delivered March 3, 1980, Opinion No. 79SA556. On March 28, 1980 the Colorado Supreme Court denied Petitioner's Motion to Vacate Remittitur, also appended to the Petition for a Writ of Certiorari.

JURISDICTION

Petitioner invokes Rule 19(1)(a) of the Rules of this Honorable Court as the Jurisdictional basis for review. While Respondent does not question the timeliness of the filing of the writ, Respondent feels that Rule 19(a)(1) is inapplicable because the Federal questions decided by the Colorado Supreme Court were

decided in accordance with applicable prior decisions of this Honorable Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

QUESTIONS PRESENTED

Respondent feels that the question presented by the Petition is the same question presented in Respondent's Motion to Suppress Evidence filed in the trial court, namely: was the warrantless search of Respondent's motor vehicle and the seizure of evidence therefrom prohibited and illegal under the Fourth Amendment of the Constituion of the United States and the judicial interpretations thereof?

STATEMENT OF THE CASE

In the early morning hours of October 15, 1979 Officer Lopez of the Colorado Springs Police Department obsered a 1967 Pontiac GTO automobile containing two occupants and proceeding at a high rate of speed. Before the Officer could engage in pursuit, however, the vehicle disappeared from his sight. Shortly thereafter, he overheard a police radio dispatcher reporting a theft of motor vehicle parts in the area he was patrolling. The dispatcher reported among the items stolen were a number of chrome lug nuts. The report also gave a description of the two persons suspected of the theft. Shortly thereafter Office Lopez

again saw the Pontiac GTO he had attempted to pursue earlier containing the same two occupants. The vehicle entered a service station at a high rate of speed, and the Officer stopped the vehicle, which was driven and owned by Defendant Bannister, for the purpose of issuing a traffic citation to him. As the Officer approached the vehicle, both parties exited. A conversation between Bannister and Officer Lopez took place just outside the left front door of the vehicle, which at the time was closed. The Officer observed chrome lug nuts in an opened glove compartment inside the vehicle as well as two tire irons on the floorboard of the back seat. All of these items were in plain view illuminated by the lights of the service station. The Officer thereupon arrested Bannister and the other occupant of the vehicle, and placed them in the rear seat of his police cruiser. He then searched the automobile without benefit of a warrant, seizing the lug nuts and tire irons. Prior to his trial for theft of motor vehicle parts, Defendant Bannister moved to suppress the items seized by the Officer. The trial court granted the motion, and upon appeal to the Colorado Supreme Court, the trial court's ruling was affirmed. Thereafter the People of the State of Colorado filed the Petition for Writ of Certiorari with this Honorable Court.

ARGUMENT

IN AFFIRMING THE TRIAL COURT'S SUPPRESSION ORDER, THE COLORADO SUPREME COURT DID NOT ESTABLISH A NEW STANDARD OF SEARCH AND SEIZURE, BUT RATHER PROPERLY APPLIED BOTH FEDERAL AND STATE JUDICIAL INTERPRETATIONS OF THE FOURTH AMENDMENT AS APPLIED TO WARRANTLESS AUTOMOBILE SEARCHES.

Petitioner contends that the Colorado Supreme Court by suppressing evidence in this case established a standard of search

moment of its seizure does not indicate that the "plain view" doctrine applies. In Coolidge, this Honorable Court emphasized that the "plain view" doctrine was subject to the limitations that plain view is never enough to justify the warrantless search and seizure of evidence, and that the discovery of evidence in plain view must be inadvertent. The Court emphasized that while the seizure of a particular object might be justified whether the object was observed in plain view following an initial intrusion which was legitimated either by a warrant or such exceptions to the warrant requirement as hot pursuit or search incident to arrest, the plurality stated that to extend the scope of such an intrusion to the seizure of objects not contraband nor stolen nor dangerous in themselves which the police knew in advance they would find in plain view and which they intended to seize would fly in the face of the basic rule that no amount of probable cause can justify a warrantless search. In its brief, Petitioner claims that the instant case differs from Coolidge. It is, however, similar in one crucial regard: in neither did there exist exigent circumstances justifying a warrantless search. In the instant case Defendant Bannister was out of the vehicle with the door closed at the time he first encountered Officer Lopez, and at the time Officer Lopez conducted the search of Bannister's behicle, Bannister was under arrest and in the police cruiser. The opportunity for search was thus hardly fleeting. The items seized were not seized pursuant to an inventory search of the kind involved in South Dakota v. Opperman, 428 U. S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). Because Bannister's vehicle was in a well-lighted area, not on a highway, and the occupants of the vehicle were already under arrest and in police custody, the case is distinguishable also from Carroll v. U. S., 267 U. S. 132, 45 S. Ct. 280,

69 L. Ed. 543 (1925) and Chambers v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) for, as this Honorable Court stated in Coolidge at 403 U. S. 479:

> Carroll, on its face, appears to be a classic example of a doctrine that warrantless searches are per se unreasonable in the absence of exigent circumstances. Yet if we take the viewpoint of a judge called on only to decide in the abstract, after the fact, whether the police have behaved "reasonably" under all the circumstances - in short if we simply ignore the warrant requirement - Carroll comes to stand for something more. The stopping of a vehicle on the open highway and a subsequent search amount to a major interference in the lives of the occupants. Carroll held such an interference to be reasonable without a warrant, given probable cause. It may be thought to follow a fortiori that the seizure and search here - where there was no stopping and the vehicle was unoccupied - were also reasonable, since the intrusion was less substantial, although there were no exigent circumstances whatever. Using reasoning of this sort, it is but a short step to the position that it is never necessary for the police to obtain a warrant, before searching and seizing an automobile, provided they have probable cause.

Essentially Petitioner is urging the adoption of a "reasonableness" test to determine the validity of warrantless searches, rather than the test applied in Coolidge. In the instant case, it may have been inconvenient or time consuming for the police to obtain a warrant, but not impossible. There was no danger of the car being tampered with. Unlike Opperman, there was no indication of valuables in the vehicle that required an immediate inventory search.

In its Petition, Petitioner repeatedly states that Coolidge is inapplicable to the instant case, yet it is never made clear how the two differ, except that in the instant case some of the items seized were allegedly stolen. This Honorable Court has repeatedly held that plain view is never enough to justify a warrantless automobile search, and there are no additional factors present to redeem the police conduct here. Since Bannister was already

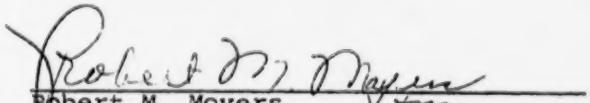
under arrest, the search here cannot be justified as a search incident to arrest. Since the car was stopped, with all occupants out of the vehicle, and since it was parked in an area where the police would have had no problem preventing its being tampered with until the warrant were obtained, the theory that the search is justified as a "fleeting" opportunity also fails.

In the instant case the Colorado Supreme Court has adopted the reasoning of Coolidge in suppressing the evidence seized. An analysis of Petitioner's argument reveals that it is not the method used by the Colorado Supreme Court to arrive at its decision to which Petitioner objects, but rather that Court's refusal to condone the search, in the absence of any findings of exigent circumstances by the trial court, solely on the "plain view" theory. Such a ruling by the Colorado Supreme Court would indeed conflict with this Honorable Court's declarations in Coolidge. No new standard has been advanced by the Colorado Supreme Court in affirming the suppression order, and contrary to Petitioner's position, a "contorted" reading of Coolidge was not necessary to reach the finding that the Court made. Petitioner seems to forget that the burden of proof in justifying a warrantless search is on the prosecution, not the defendant, and that in the instant case, the only theories advanced by the prosecution to justify this warrantless search were the "plain view" doctrine and search incident to arrest (this argument has apparently been abandoned in this Petition); that theory was held insufficient by the Colorado Supreme Court based upon what this Honorable Court has stated in Coolidge.

It is respectfully requested that this Court not grant the Petition for Certiorari herein, because Petitioner has failed to show that the Colorado Supreme Court has decided a Federal

question in conflict with the prior decisions of this Honorable Court. Rather, all that the brief of the Petitioner shows is that the Colorado Supreme Court was asked to justify a warrantless automobile search solely on the basis of the plain view doctrine, which, on the facts in the instant case and based upon the prior rulings of this Honorable Court, would have in fact been contrary to the law.

Respectfully submitted,



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